

**BEFORE THE**  
**POSTAL REGULATORY COMMISSION**  
**WASHINGTON, DC 20268-0001**

**First-Class Mail and Periodicals  
Service Standard Changes, 2021**

**Docket No. N2021-1**

**DOUGLAS F. CARLSON**

**REPLY BRIEF**

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**I. THE POSTAL SERVICE’S ANALYSIS OF REGIONAL SERVICE DISCRIMINATION IS IMPROPER.**

**A. Although the Postal Service’s Proposal Fails the Commission’s Test from the Gamefly Case, the Postal Service’s Analysis Also Demonstrates the Limits of This Test for a Regional Service Discrimination Case.**

The Postal Service advances the Commission’s three-part test from the Gamefly case as the analytical framework to evaluate possible discrimination under 39 U.S.C. § 403(c).<sup>1</sup> In addition, in his initial brief, Steven Hutkins conducts a solid analysis of the Postal Service’s proposal under the Gamefly test. His analysis shows that the service standards proposed in this docket would provide mailers in distant regions of the country, including the entire West Coast, “less-favorable rates or terms and conditions than one or more other mailers.”<sup>2</sup> He also shows that the mailers receiving differing levels of service are similarly situated: “The users of the mail in the regions that will be more impacted by the new standards are similarly situated to mailers in other regions in all relevant respects: they send and receive the same kind of mail, they use postal services in exactly the same way, and they pay the same rates for First Class mail. In all relevant respects besides location there is no difference between one group of users and another.”<sup>3</sup> Finally, Mr. Hutkins argues that the discrimination would be undue because the justifications for the proposal — an improvement to the Postal Service’s net income and improved reliability of delivery — are questionable.<sup>4</sup>

The difficulty with applying the Gamefly test in the current case is obvious, literally, in how the Postal Service applied it. According to the Postal Service, “similarly situated mailers would be treated the same. For example, all First-Class Mail with a drive time of more than 41 hours will have a 5-day service

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<sup>1</sup> Postal Service Initial Brief at 46.

<sup>2</sup> Hutkins Initial Brief at 3–9.

<sup>3</sup> *Id.* 10; *see also Id.* 9.

<sup>4</sup> *Id.* 3, 10–21.

standard, whether the letter is traveling from Los Angeles to Augusta, GA (2,350 miles; 53.5 hours) or from Louisville to Medford, OR (2,363 miles; 47.8 hours).”<sup>5</sup> However, I allege that mailers in “remote” parts of the country — including the West Coast, south Florida, southern Texas, and western Maine — will suffer a disproportionate reduction in the level of service compared to mailers in other parts of the country. The discrimination arises because the Postal Service is proposing to provide a lower level of service, measured in a variety of ways,<sup>6</sup> to customers located in certain parts of the country. On its face, the problem is that customers who are not in the same location are treated differently. Mr. Hutkins observed this issue as well: “One could argue, of course, that users in the Western and Pacific region are not “similarly situated” to mailers in the rest of the country just as a matter of geography — they live in a different places. But that would not make sense since location is the factor on which the discrimination is based.”<sup>7</sup>

While Mr. Hutkins’s analysis of the current proposal under the Gamefly test is correct and persuasive, a literal and narrow interpretation of “similarly situated” could allow regional discrimination to pass muster precisely because the affected customers are in different locations. Therefore, I question whether the test announced in Gamefly should, in its current form, govern the analysis of a claim of regional discrimination. In fact, the Commission noted in Docket No. C2020-2 that the Gamefly test applies to *price* discrimination.<sup>8</sup> The Postal Service’s proposal in this docket does not implicate price discrimination. Therefore, while the Gamefly test provides useful guidance, literal application of the test to regional service discrimination may lead to problematic results.

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<sup>5</sup> Postal Service Brief at 48–49.

<sup>6</sup> These measures include the proportion of origin-destination pairs suffering a service reduction, the proportion of volume that would suffer a service reduction, and the overall reduction in days to delivery.

<sup>7</sup> Hutkins Brief at 10.

<sup>8</sup> Docket No. C2020-2, Order No. 5491 at 8, filed April 28, 2020.

For this reason, in my initial brief, I observed that the Commission's analysis in Docket No. C2001-3 is more applicable and relevant to the current proposal than the Gamefly test when, as here, the question is whether a service reduction that affects at least one fifth of the mailers in the country is unduly or unreasonably discriminatory. Indeed, when the Commission issued its decision in the Gamefly case, where the issue was price discrimination, the Commission did not mention its analysis from Docket No. C2001-3, and the Commission certainly did not overrule its decision in Docket No. C2001-3. Therefore, while the test from the Gamefly case applies to price discrimination, it may not provide the best analytical framework for large-scale regional service discrimination.

**B. The Postal Service Improperly Distinguishes the Commission's Decision in Docket No. C2001-3.**

As I argued in detail in my brief, the Commission's decision in Docket No. C2001-3 provides the proper roadmap for evaluating the discriminatory nature of the Postal Service's current proposal.<sup>9</sup> The previous decision is particularly useful given that both cases involved changes in service standards that were based on distance, not needs of customers, and in both cases certain areas of the country suffered a disproportionate reduction in service.

The Postal Service suggests on brief that the procedural posture distinguishes this case from Docket No. C2001-3.<sup>10</sup> True, the Postal Service implemented changes in service standards in 2000 and 2001 without first seeking an advisory opinion, whereas now the Postal Service is requesting an advisory opinion before implementing the changes. However, the Postal Service's focus on procedural posture is an attempt to distract from substance. The changes in service levels in Docket No. C2001-3 and the current case are substantively identical, with the exception being that the changes proposed now are worse than the ones implemented in 2000 and 2001, both in terms of regional disparities and the depth of the service reduction. The Commission's opinion

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<sup>9</sup> Carlson Initial Brief at 20–22.

<sup>10</sup> Postal Service Brief at 51–53.

in Docket No. C2001-3 compels similar findings of violations of policies in Title 39 in the current case.

**C. Customers in Remote Parts of the Country Do Not Enjoy a Legally Significant Advantage that the Postal Service’s Proposal Would Properly Reduce.**

The Postal Service constructs an example that supposes that a Los Angeles resident and a Louisville resident both send a letter to New York City. For both letters, the current service standard is three days.<sup>11</sup> The Postal Service suggests that the letter from Los Angeles moves 3.7 times faster than the letter from Louisville, based on distance divided by time, and the price per mile is lower for the letter mailed in Los Angeles than for the letter mailed in Louisville. Under the current proposal, the letter from Los Angeles would slow to five days, but the letter still would move 2.2 times faster than the letter from Louisville.<sup>12</sup> Therefore, the Postal Service cannot understand how the Los Angeles resident would be a “victim.”<sup>13</sup> Fortunately, the advisory opinion process exists to help the Postal Service understand why the Los Angeles resident would be a victim of service discrimination.

First, 39 U.S.C. § 404(c) provides, “The Postal Service shall maintain one or more classes of mail for the transmission of letters sealed against inspection. The rate for each such class shall be uniform throughout the United States, its territories, and possessions.” In addition, section 101(a) requires the Postal Service to “bind the Nation together[.]”<sup>14</sup> A central policy of our nation’s postal system and the universal service obligation is to provide service to the Los Angeles resident and the Louisville resident at the same price. In fact, the D.C. Circuit found that the requirement to bind the nation together “is a value that Congress favored strongly — to the point of mandating nonzoning for first-class

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<sup>11</sup> Postal Service Brief at 47–49.

<sup>12</sup> *Id.* 47.

<sup>13</sup> *Id.* 47–48.

<sup>14</sup> 39 U.S.C. § 101(a).

mail.”<sup>15</sup> Therefore, the Postal Service’s price-per-mile comparison, while perhaps interesting, is legally irrelevant.

Second, for the level of service that each of these customers receives, section 101(e) requires the Postal Service, in determining “all” policies for postal services, to “give the highest consideration to the requirement for the most expeditious collection, transportation, and delivery of important letter mail.”<sup>16</sup> Section 101(f) states, in pertinent part, “In selecting modes of transportation, the Postal Service shall give highest consideration to the prompt and economical delivery of all mail[.]”<sup>17</sup> Due to practical constraints of time, equipment, labor, and transportation, the Postal Service cannot provide two-day delivery nationwide. When the destination of a letter is outside the two-day delivery area, the service standard is three days. The current policy to provide three-day service to New York City from both Los Angeles and Louisville is a necessary consequence of the policies in Title 39 described herein and the practical limitations that prevent two-day service. Three-day service is the most “prompt” service that the Postal Service can provide, and the Postal Service complies with the statutory framework by providing it. Even though the letter from Los Angeles may move “faster” to achieve three-day delivery than the letter from Louisville, this result is a policy decision firmly embodied in Title 39. Thus, the Postal Service’s analysis suggesting that the customer in Los Angeles is receiving a greater level of service than a customer in Louisville is legally irrelevant.

Since the Postal Service’s novel comparison of speed and price per mile for the letters mailed in Los Angeles and Louisville is legally irrelevant, the Postal Service cannot claim that the current proposal reduces these disparities and, therefore, is equitable or not discriminatory.

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<sup>15</sup> *Mail Order Association of America v. U.S. Postal Service*, 2 F.3d 408, 437 (D.C. Cir. 1993). Also, the Postal Service’s assertion in its brief, that “such pricing is a matter of Postal Service discretion and tradition, not a statutory mandate,” Postal Service Brief at 50, contradicts the court opinion and the statute.

<sup>16</sup> 39 U.S.C. § 101(e).

<sup>17</sup> *Id.* § 101(f).



## II. THE POSTAL SERVICE INVOKES BALANCING IN STATUTES WHERE NONE EXISTS.

The Postal Service claims that section 101(a) and section 101(f) require the Postal Service to balance certain objectives. For example, the Postal Service sees a balancing test for promptness and reliability in section 101(a)'s mandate to provide "prompt, reliable and efficient services to patrons in all areas[.]"<sup>18</sup> Similarly, the Postal Service imagines a balancing requirement for efficiency and economy in section 101(f)'s mandate "In selecting modes of transportation, the Postal Service shall give highest consideration to the prompt and economical delivery of all mail[.]"<sup>19</sup> However, by its plain meaning, the statute requires the Postal Service to provide *both* prompt and economical delivery of all mail. The Postal Service's interpretations may be convenient, but the Postal Service's inventive principle of statutory construction is unwarranted.

In reality, the statutes do not require or envision balancing. Instead, the statutes use the conjunction "and," which means that the Postal Service must perform all the specified mandates. For example, in section 101(a), the Postal Service must provide prompt, reliable, *and* efficient services. The Postal Service cannot fail to provide prompt service in exchange for reliable service. Similarly, no balancing exists between prompt and efficient service. Rather, if the Postal Service has two choices for air transportation to provide prompt service between two points, the Postal Service should select the cheaper one. However, the Postal Service cannot choose slow surface transportation because surface transportation is cheaper than air transportation.

The same analysis applies to section 101(f): in providing prompt service, the Postal Service should find the most economical way to do it. Nevertheless, in promoting economy, the Postal Service cannot sacrifice speed. Similarly, in section 101(e), the Postal Service should use automated sorting equipment instead of manual labor to provide prompt service.

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<sup>18</sup> 39 U.S.C. § 101(a); Postal Service Brief at 44.

<sup>19</sup> 39 U.S.C. § 101(f).

Neither statute allows the Postal Service to downplay one criterion in favor of another. If Congress envisioned a balancing test, Congress had many choices of words available to write such a provision into the statute. For example, Congress specifically introduced balancing into section 3622(b) and (c). Section 3622(b) requires the Commission's system for regulating market-dominant products to be "designed to achieve the following [nine] objectives, each of which shall be applied in conjunction with the others[.]"<sup>20</sup> Section 3622(c) requires the Commission to "take into account" 14 factors.<sup>21</sup> Congress knows how to allow for balancing in postal statutes. But it did not do so for the basic policies in section 101(e) and (f). The Postal Service is attempting to evade statutory mandates by reading the conjunction "and" as a license to deemphasize or avoid requirements that stand in the way of the Postal Service's plan to degrade service.

### **III. THE PUBLIC REPRESENTATIVE'S BRIEF DOES NOT REPRESENT THE PUBLIC.**

In an advisory opinion proceeding, the statute requires the Commission to appoint an officer to represent the interests of the general public.<sup>22</sup> Moreover, each commissioner must certify his/her agreement with "the opinion that in his judgment the opinion conforms to the policies established under this title."<sup>23</sup>

The initial brief of the public representative denies the public the representation that Congress prescribed and does not represent the interests of the general public. The first 14 pages of the 26-page brief merely recite the Postal Service's proposal and other evidence. Although the analysis purportedly begins with a section on page 15 titled "Analysis," the recitation does not stop until page 19. The public representative then determines that the changes that the Postal Service proposes are in the interests of the general public.<sup>24</sup> The public repre-

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<sup>20</sup> *Id.* § 3622(b).

<sup>21</sup> *Id.* § 3622(c).

<sup>22</sup> *Id.* § 3661(c).

<sup>23</sup> *Id.*

<sup>24</sup> Public Representative Initial Brief at 25.

sentative does not mention Title 39, the central guidepost for evaluating the Postal Service's proposed service changes.

Although in some Commission proceedings public interest and attention are scant, and therefore a public representative must apply general concepts of consumer protection to articulate a public interest, in this case the public representative had hundreds of comments, or statements of position, filed with the Commission to review to discern public opinion. Also, APWU witness DeMatteo testified about the theme that emerged from his review of more than 77,000 comments in response to the Postal Service's *Federal Register* notice. Witness DeMatteo concluded from the comments that the public wants reliable and speedy service in the future.<sup>25</sup> And two members of the general public made the special effort to testify in this proceeding: witness Hutkins and I. The public representative ignored all this public input. In fact, he dismissed the commenters' concerns with the purely speculative assumption that, if only they understood the reason for the changes, their desire for speed would dissolve: "Many of these mailers are aware that speed of delivery will decrease but are unaware of why these changes are being proposed."<sup>26</sup> He continued, "Members of the general public must have a clear understanding of the tradeoffs associated with this proposal in order to meaningfully engage in the process."<sup>27</sup> The public representative has no basis for believing that the public does not have a clear understanding of this proposal or that the efforts of more than 77,400 people to engage in the process are not meaningful. The public is speaking, the public does not like the proposal, and apparently the public representative was not listening. While the public representative is not necessarily required to adopt the positions of commenters, surely public representation includes acknowledging those viewpoints, if not, ideally, advocating for the position of the people who took the time to engage in the process. The public representative's brief does not represent the interests of the public and should be afforded no weight.

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<sup>25</sup> APWU-RT-2 at 10.

<sup>26</sup> Public Representative Initial Brief at 24.

<sup>27</sup> *Id.*

#### **IV. CONCLUSION**

As I explained in my initial brief and in this reply brief, the Commission should find that the Postal Service's proposed changes in service standards would not comply with 39 U.S.C. §§ 101(a), 101(e), 101(f), 403(c), 3661(a), and 3691(c)(3).